A

KHOW NGEE SUN

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN JCA
[CRIMINAL APPEAL NO: B-05-367-2010]

C

18 NOVEMBER 2013

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Accused charged for trafficking - Dangerous Drugs Act 1952, s. 39B(1)(a) - Drugs found in locked room using keys seized from*

D

accused person during body search - Denial of knowledge on drugs seized - Allegation that drugs belonged to housemate - Defence did not raise any reasonable doubt - Accused convicted for charge and sentenced to death - Whether conviction and sentence safe

E

CRIMINAL PROCEDURE: *Charge - Defective charge - Accused charged for trafficking four types of drugs - Dangerous Drugs Act 1952, s. 39B(1)(a) - Charges for four types of drugs lumped into one - Whether there should have been four separate charges - Whether lumping of four different types of drugs into one charge rendered conviction null*

F

and void - Whether there was failure of justice - Whether accused prejudiced

CRIMINAL PROCEDURE: *Exhibits - Evidence - Exhibit recovered by raiding officer and exhibit sent for analysis - Whether same - Whether chain of evidence broken - Whether addressed by trial judge - Whether*

G

detrimental to prosecution's case

The police had laid an ambush outside an apartment and a woman was seen coming out of the apartment. The woman then took the police officer ('PW5') inside the apartment but a search on the

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apartment revealed nothing illegal. There was a knock on the apartment's front door and the appellant was seen outside the grille door of the apartment holding a black-coloured sling bag. Before PW5 could open the grille door, the appellant ran to the emergency exit but was successfully arrested. Through a body

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search, PW5 recovered, *inter alia*, an access card, a mobile phone and a keychain with three keys. Two days later, PW5 received a call from one Mr Wee ('PW6'), pertaining to the installation of an

air conditioner at the condominium which PW6 rented to the appellant. A raiding team headed to the condominium only to find that it was empty. There were three rooms; one room was locked but the other two were not. Using the set of keys seized, PW4 managed to unlock the door of the locked room and inside, one 'POLO' bag was found. Inside the bag, various substances suspected to be drugs were found. Upon analysis, the chemist confirmed the substances to be four types of drugs, namely ketamine, methylenedioxymethamphetamine ('MDMA'), methamphetamine and methylenedioxy-amphetamine ('MDA'). The appellant was charged in the High Court for trafficking in dangerous drugs, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). In his defence, the appellant alleged that he had rented the condominium together with one Ah Fei and one Ah Seng. The locked room belonged to Ah Fei and the appellant denied any knowledge of the drugs inside the bag and said that he had never seen all the items. At the conclusion of the trial, the trial judge found the appellant's defence to be an afterthought and did not raise a reasonable doubt on the prosecution's case. The appellant was thus convicted for the charge and sentenced to death. Hence, the present appeal. The appellant argued that (i) the discrepancies in the drug exhibits were not considered by the trial judge; (ii) that there should have been four separate charges against the appellant and that the lumping of the charge had caused serious prejudice to the appellant; and (iii) that the trial judge's approach as regards to trafficking was wrong in law as the argument related to the charge of MDA, methamphetamine and MDMA where s. 12 of the DDA did not apply. In respect of ketamine, the appellant submitted that the prosecution must provide for presumption in trafficking in ketamine. It was further submitted that there must be an overt act, more than just 'keeping', whereas the trial judge had relied on 'keeping' under s. 2 of the DDA.

Held (dismissing appeal; affirming conviction and sentence) Per Tengku Maimun JCA delivering the judgment of the court:

(1) The trial judge did make a finding on the chain of evidence. There was no reason to disturb the finding of the trial judge. Her Ladyship had addressed the real question which was whether the exhibit recovered by PW1 was the same exhibit sent for analysis and subsequently produced in court as evidence. (para 18).

(2) Even though there should have been four separate charges against the appellant for the four different types of drugs, the lumping of the four different types of drugs *per se* did not render the conviction a nullity. What needed to be considered was whether the defective charge against the appellant had occasioned a failure of justice or had caused any prejudice to the appellant. The appellant was convicted on the charge of ketamine. This was clear from the finding of the trial judge which specifically referred to ketamine in calling for the defence of the appellant. Since the conviction was not in respect of MDMA, methamphetamine and MDA, the defective charge had not occasioned a failure nor had it caused any prejudice to the appellant. (paras 20-24)

(3) The trial judge had relied on the act of 'keeping' coupled with the quantity of the drugs and the recovery of transparent empty plastic packets of varying sizes and a quantity of rubber band to find that the appellant was keeping the ketamine for purposes of sale to others. There was no error on the part of the trial judge in taking such approach as 'keeping' clearly falls within the definition of trafficking under s. 2 of the DDA. (para 25)

Bahasa Malaysia *Translation Of Headnotes*

Pihak polis telah merancang satu serang hendap di luar sebuah apartmen dan seorang wanita dilihat keluar dari apartmen tersebut. Wanita tersebut kemudiannya membawa pihak polis ('PW5') ke dalam apartmen tersebut tetapi carian ke atas apartmen tidak mendedahkan apa-apa yang menyalahi undang-undang. Terdapat ketukan pada pintu hadapan apartmen dan perayu dilihat berada di luar pintu gril apartmen memegang beg galas berwarna hitam. Sebelum PW5 sempat membuka pintu gril, perayu berlari ke pintu kecemasan tetapi berjaya ditangkap. Melalui carian badan, PW5 menjumpai, antara lain, kad akses, sebuah telefon bimbit dan gelang kunci dengan tiga kunci. Dua hari kemudian, PW5 menerima satu panggilan daripada seorang yang bernama Encik Wee ('PW6'), berkenaan pemasangan pendingin hawa di kondominium yang PW6 sewakan kepada perayu. Satu pasukan serbuan telah ke kondominium tersebut hanya untuk mendapati bahawa ia kosong. Terdapat tiga bilik; dua bilik berkunci manakala satu lagi tidak. Menggunakan kunci yang dirampas, PW4 berjaya membuka pintu bilik yang berkunci tersebut dan di dalamnya sebuah beg 'POLO' dijumpai. Di dalam beg tersebut, pelbagai

bahan-bahan yang disyaki dadah dijumpai. Selepas analisa, ahli kimia mengesahkan bahawa bahan-bahan tersebut sememangnya empat jenis dadah, khususnya, ketamin, methylenedioxymethamphetamine ('MDMA'), methamphetamine dan methylenedioxy-amphetamine ('MDA'). Perayu dituduh di Mahkamah Tinggi kerana mengedar dadah-dadah berbahaya, satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Dalam pembelaannya, perayu menghujahkan bahawa dia telah menyewa kondominium tersebut dengan seorang yang bernama Ah Fei dan seorang lagi, Ah Seng. Bilik yang berkunci tersebut adalah bilik Ah Fei dan perayu menafikan sebarang pengetahuan mengenai dadah-dadah di dalam beg tersebut serta menyatakan bahawa dia tidak pernah melihat bahan-bahan tersebut. Di penutup perbicaraan, hakim bicara memutuskan bahawa pembelaan perayu adalah satu fikiran semula dan tidak membangkitkan sebarang keraguan munasabah ke atas kes pendakwaan. Dengan itu, perayu disabitkan atas pertuduhan dan dijatuhkan hukuman mati. Oleh itu, rayuan ini. Perayu menghujahkan bahawa (i) kepincangan-kepincangan dalam ekshibit-ekshibit dadah tidak dipertimbangkan oleh hakim bicara; (ii) mestilah terdapat empat pertuduhan yang berbeza terhadap perayu dan bahawa longgokan pertuduhan telah menyebabkan prejudis serius terhadap perayu; dan (iii) bahawa pendekatan hakim bicara mengenai pengedaran adalah salah di sisi undang-undang kerana hujahan adalah mengenai pertuduhan MDA, methamphetamine dan MDMA di mana s. 12 ADB tidak terpakai. Berkenaan ketamin, perayu menghujahkan bahawa pihak pendakwaan mestilah memperuntukkan anggapan bagi pengedaran ketamin. Dihujahkan selanjutnya bahawa mestilah terdapat tindakan terang-terangan, lebih daripada sekadar 'menyimpan', sedangkan hakim bicara bersandarkan pada 'menyimpan' di bawah s. 2 ADB.

Diputuskan (menolak rayuan; mengekalkan sabitan dan hukuman)

Oleh Tengku Maimun HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara telah membuat dapatan mengenai rantaian keterangan. Tiada sebab untuk mengganggu dapatan hakim bicara. Beliau telah menangani persoalan sebenar sama ada ekshibit yang dirampas oleh PW1 adalah ekshibit yang sama yang dihantar untuk analisa dan seterusnya dikemukakan di mahkamah sebagai keterangan.

(2) Walaupun sepatutnya terdapat empat pertuduhan berbeza terhadap perayu bagi empat jenis dadah, longgokan keempat-empat jenis dadah tersebut, dengan sendirinya, tidak menjadikan sabitan tidak sah. Apa yang perlu dipertimbangkan adalah sama ada pertuduhan cacat terhadap perayu menyebabkan ketidakadilan atau menyebabkan prejudis terhadap perayu. Perayu disabitkan atas kesalahan ketamin. Ini jelas daripada dapatan hakim bicara yang secara khususnya merujuk kepada ketamin dalam memanggil perayu untuk membela diri. Oleh kerana sabitan bukan bagi MDMA, methamphetamine dan MDA, pertuduhan yang cacat tidak menyebabkan kegagalan mahupun menyebabkan prejudis terhadap perayu.

(3) Hakim bicara telah bersandarkan pada tindakan 'menyimpan' berserta dengan kuantiti dadah-dadah dan rampasan bungkusan-bungkusan plastik lutsinar kosong pelbagai saiz dan sejumlah gelang getah untuk memutuskan bahawa perayu sedang menyimpan ketamin bagi tujuan jualan kepada yang lain. Tiada kekhilafan di pihak hakim bicara dalam mengambil pendekatan sedemikian kerana 'menyimpan' jelas terjumlah di bawah definisi pengedaran di bawah s. 2 ADB.

Case(s) referred to:
Arumugam Periasamy v. PP [2005] 3 CLJ 685 CA ***(refd)***
Hasbala Mohd Sarong v. PP [2013] 6 CLJ 945 FC ***(refd)***
Loh Kah Loon v. PP [2011] 5 CLJ 345 FC ***(refd)***
Ong Ah Chuan v. PP [1980] 1 LNS 181 PC ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***
Yong Yow Chee v. PP [1998] 1 SLR 273 ***(refd)***
Zaifull Muhammad v. PP & Another Appeal [2013] 2 CLJ 383 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60(1)
Criminal Procedure Code, ss. 163, 422
Dangerous Drugs Act 1952, s. 2, 37(da), 39A(1), 39B(1)(a), 39B(2)

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the prosecution - Tengku Amir Zaki Tengku Abdul Rahman; DPP

[Appeal from High Court, Shah Alam; Criminal No: 45-5-2008]

Reported by Najib Tamby

JUDGMENT

Tengku Maimun JCA:

[1] The appellant was charged for trafficking in dangerous drugs. The amended charge (exh. P5) reads:

> Bahawa kamu pada 25 Oktober 2007, jam lebih kurang 2.00 petang di alamat No. Y-16-3, Block Kayangan, D'aman Crimson Apartments, Jalan PJU 1A/41, Ara Jaya di dalam daerah Petaling, di dalam Negeri Selangor Darul Ehsan, telah mengedar dadah berbahaya iaitu 12,915.17 gram Ketamine, 20.51 gram 3,4 - Methylenedioxymethamphetamine (MDMA), 47.8 gram Methamphetamine dan 0.35 grams of Methylenedioxy-amphetamine (MDA), dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] The prosecution's case is as follows. On 22 October 2007 the police party led by PW5, laid an ambush outside an apartment K-10-3, Apartment Perdana Puri, Kepong, Selangor. At about 8.15pm, they saw a woman coming out of the apartment. PW5 introduced himself to the woman as a police officer who then took PW5 to the apartment. PW5 searched the apartment but he did not find anything illegal. At about 10pm, PW5 heard knocking on the front door of the apartment. He opened the door and saw a male Chinese (identified as the appellant) outside the grille door of the apartment. SP5 saw the appellant carrying a black coloured sling bag. PW5 introduced himself as a police officer to the appellant. Before PW5 could open the grille door, the appellant ran to the emergency exit. PW5 gave chase. The appellant was arrested and a body search was done where PW5 recovered among others, an access card, a mobile phone and a keychain with three keys. The appellant was brought back to the apartment where another access card was recovered from the appellant's bedroom. The mobile phone, the keys and the access cards were held by PW5 pending further information as the appellant had refused to disclose the purpose of the keys.

[3] On 24 October 2007 at about 1.30pm PW5 received a call on the mobile phone seized from the appellant. The call came from a male Chinese who identified himself as Mr Wee (PW6). Simply put, PW6's call pertained to the installation of an air conditioner at unit Y-16-13, Block Kayangan, Crimson Apartments, Petaling Jaya (the condominium). PW6 had rented the said condominium to the appellant.

[4] On 25 October 2007 at about 2pm, the raiding team consisting of PW1, PW4, PW11 and several other police officers together with the appellant went to Crimson Apartments. With the access cards recovered from the appellant the police was able to enter the car park and the lift. They went up to the 16th floor and to the condominium. PW4 managed to open the front grille and the wooden door using two out of the three keys on the keychain. The front grille door was padlocked using combination numbers. The police tried for 10 to 15 minutes with different numbers connected to the appellant ie, his birth date, his identity card number and his mobile phone number but they were not successful. Finally PW1 thought of the appellant's car number 8777 and the police managed to unlock the padlock using the said number.

[5] The raiding team entered the condominium and found that it was empty. Except for some clothings hanging in the living hall, there was no furniture in the said condominium. There were three rooms. Two rooms were unlocked and one room was locked. Using a key on the keychain, PW4 unlocked the door of the locked room. On the floor at the left corner of the said room PW1 found one 'POLO' bag. Inside the bag, PW1 found the following items:

(i) 10 aluminium packets which contained transparent plastic filled with a white coloured powder suspected to be ketamine;

(ii) Three transparent plastic packets filled with a crystal like substance suspected to be ketamine;

(iii) Six transparent plastic packets filled with a crystal like substance suspected to be syabu;

(iv) One transparent plastic packet which contained 14 white coloured plastic packets filled with 1275 red coloured pills suspected to be ecstasy pills;

(v) One transparent plastic packet which contained 13 small plastic packets each filled with green coloured pills totalling 620 pills suspected to be ecstasy pills; and

(vi) One transparent plastic packet which contained a variety of different coloured pills totalling 64 pills suspected to be ecstasy pills.

[6] PW1 also found a red coloured plastic pail containing a white coloured powder which he suspected to be ketamine and a black coloured bag which contained empty transparent plastic packets of varying sizes. All the items found were seized and handed over to the investigating officer, PW12. Upon analysis, the chemist (PW2) confirmed the substances contained the four types of drugs which formed the subject matter of the amended charge against the appellant.

[7] At the end of the prosecution's case, the learned trial judge found that the appellant had exclusive possession of the condominium and the room from where the dangerous drugs were recovered by PW1. The learned trial judge then drew an inference that the appellant had *mens rea* possession of the drugs inside the locked room, the reasons being that he had the sole custody and control of the drugs inside the locked room and that he had knowledge of the contents in the bag which he had kept them secured under lock and key and that he could gain access to them whenever he wished to.

[8] Applying s. 2 of the Act and taking into account the quantity of ketamine recovered; the transparent empty plastic bags of varying sizes and a quantity of rubber bands, the learned trial judge was satisfied that the ketamine could not have been for the personal consumption of the appellant and that the appellant was keeping it at his rented condominium for purposes of sale to others. The learned trial judge ordered the appellant to enter his defence.

[9] Essentially, the defence of the appellant was that he had rented the house together with one Ah Fei and one Ah Seng. According to the appellant, he had chosen the room at the back; that the locked room was Ah Fei's room and that Ah Fei had a set of duplicate keys made of the three keys. The appellant further said that it was Ah Fei who had suggested using the registration number of the appellant's car as the combination number of the padlock. The appellant denied any knowledge of the drugs inside the bag and said that he had never seen all those items before. The appellant said the items probably belong to Ah Fei.

[10] At the conclusion of the trial, the learned trial judge found that the defence of the appellant was an afterthought and did not raise a reasonable doubt on the prosecution's case. The names Ah

A Fei and Ah Seng were only raised in the defence and the possibility that the drugs belong to Ah Fei or Ah Seng was never suggested to any of the prosecution's witnesses. The appellant was thus convicted and sentenced to death, hence this appeal.

B **The Appeal**

[11] Although the petition of appeal contains several grounds of appeal, before us, learned counsel for the appellant canvassed only the following grounds:

C (i) That there are doubts as to the identities of the drug exhibits; and

(ii) That the charge is defective.

D On these two grounds, learned counsel for the appellant submitted that the conviction is not safe.

[12] The issue on the identity of the drugs relates to the discrepancy between the oral evidence of PW1 and the police report (exh. P7) on one hand and the search list (exh. P12) and E the Borang Serah/Terima Barang Kes (exh. P14) on the other with regard to the total number of packets of ketamine. The oral evidence of PW1 states that apart from the ten aluminium packets which contained powder suspected to be ketamine, he also found "Three plastik lutsinar berisi serbuk putih di syaki dadah F ketamine." This is consistent with the police report exh. P7 which states "... Three plastik lutsinar berisi serbuk putih disyaki dadah ketamine..." However, the search list (exh. P12) and Borang Serah/Terima Barang Kes (exh. P14) show that there were four plastic packets. There was another discrepancy which relates to G the number of ecstasy pills. The oral evidence of PW1 revealed that there were 620 pills whereas his police report shows that there were 625 pills. There was no explanation by SP1 on the discrepancies. Relying on the case of *Zaifull Muhammad v. PP & Another Appeal* [2013] 2 CLJ 383, learned counsel submitted that H these discrepancies have struck at the very heart of the prosecution's case and that defence ought not to have been called.

[13] The learned Deputy Public Prosecutor conceded that there I were inconsistencies in respect of the packets of the drugs. However, it was the submission of learned deputy that there was no break in the chain of evidence; that the 625 pills were not the

subject of conviction and that there must be a challenge on the exhibits at the trial, which in this case there was none. What is more important, argued learned deputy, is whether the court can say that the drug exhibits are the same as the ones recovered by PW1. In the alternative, learned deputy submitted that this court can re-evaluate the case and invoke the proviso to s. 60(1) of the Courts of Judicature Act 1964.

[14] The second issue raised by learned counsel for the appellant was that the amended charge preferred against the appellant in the court below was bad in law as it is in violation of s. 163 of the Criminal Procedure Code (CPC). The appellant was charged for trafficking in four different types of drugs. It was the submission of learned counsel for the appellant that there should have been four separate charges against the appellant and that the lumping of the charge had caused serious prejudice to the appellant.

[15] It was further the submission of learned counsel that the learned trial judge's approach as regards trafficking is wrong in law. This argument relates to the charge of 0.35 of MDA; 47.8g of methamphetamine and 20.51g of MDMA where under s. 12 of the Act (which provides for the offence of having in possession, custody and control of dangerous drugs without authorisation) trafficking does not apply. In respect of ketamine, learned counsel submitted that the prosecution must produce evidence of direct trafficking as the law does not provide for presumption in trafficking for ketamine. The submission of learned counsel was that there must be an overt act, more than just mere 'keeping' whereas the learned trial judge had only relied on 'keeping' under s. 2 of the Act. Citing the case of *Arumugam Periasamy v. PP* [2005] 3 CLJ 685, it was the argument of learned counsel that conviction cannot stand as the finding of the learned trial judge was only in respect of keeping of ketamine and that there was no evidence of the appellant keeping the drugs for purposes of sale.

[16] In response, learned deputy submitted that because of the proximity of time and place, the charges could be lumped together and that there was no prejudice caused to the appellant by this defective charge. The appellant was represented and he was able to make a proper defence. Learned deputy relied on s. 422 of the CPC to submit that a defective charge cannot be the reason to acquit the appellant.

A **Our Findings**

[17] On the issue of identity of the drugs, the complaint by learned counsel for the appellant is that there was no explanation by PW1 on the discrepancies in the number of drug exhibits and
B that this aspect of the evidence of PW1 was not considered by the learned trial judge.

[18] Indeed, in the grounds of judgment, the learned trial judge did not deal with the discrepancies in the evidence of PW1. We noted from the appeal records that during the trial, there was no
C challenge by the defence on the discrepancies in the evidence of PW1 regarding the drug exhibits. Neither was the issue raised by learned counsel for the appellant in their submission at the close of the prosecution's case. However, the learned trial judge did make a finding on the chain of evidence. On the facts and
D circumstances of this case, we have no reason to disturb the finding of the learned trial judge when Her Ladyship said "The court also found that the seized items suspected to contain dangerous drugs were positively identified by PW1 who had made the recovery and seizure and that there was no break in the chain
E of evidence relating to them right until their production in court. They were also positively identified by the government chemist and the IO ..." The learned trial judge had addressed the real question which is whether the exhibit recovered by PW1 is the same exhibit sent to PW2 for analysis and subsequently produced
F in court as evidence (see *Loh Kah Loon v. PP* [2011] 5 CLJ 345; *Hasbala bin Mohd Sarong v. PP* [2013] 6 CLJ 945).

[19] On the issue of the defective charge, the argument of learned counsel is premised on s. 163 of the CPC which provides
G "For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately ...".

[20] The four different types of dangerous drugs which form the
H subject matter of the charge against the appellant were ketamine, MDMA, methamphetamine and MDA. While ketamine falls under s. 39B(1)(a) of the Act, the presumption of trafficking under s. 37(da) does not apply to ketamine. As for the other three types of drugs, the weight is not sufficient to attract the presumption of
I trafficking under s. 37(da) of the Act. The presumption is applicable where any person is in possession of 50g or more in

weight of MDMA; 50 grams or more in weight of methamphetamine and 50g or more in weight of MDA. In the instant case, the weight of MDMA was 20.51g; methamphetamine was 47.8g and MDA was in the quantity of 0.35g. The offence in respect of methamphetamine, MDMA and MDA is thus punishable under s. 39A(1) and not 39B(2) of the Act. We therefore agree with learned counsel that there should have been four separate charges against the appellant for the four different types of drugs.

[21] Be that as it may, it is our judgment that the lumping of the four different types of drugs *per se* does not render the conviction a nullity. Section 422 of the CPC provides:

> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of:
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code;
>
> (b) …
>
> (c) …
>
> unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[22] Hence, what needs to be considered is whether the defective charge against the appellant had occasioned a failure of justice or had caused any prejudice to the appellant (see *Yong Yow Chee v. Public Prosecutor* [1998] 1 SLR 273).

[23] We find from the grounds of judgment that the appellant was convicted on the charge of ketamine. This is clear from the following finding of the learned trial judge where Her Ladyship had specifically referred to ketamine in calling for the defence of the appellant:

> Based on the considerably large quantity of ketamine recovered by PW1 and also the recovery by PW1 of a bag containing a quantity of transparent empty plastic packets of varying sizes, P43, P44 and P45, and a quantity of rubber bands, P46, the court was satisfied that the ketamine could not have been for the personal

A consumption of the accused and that the accused was keeping it at his rented condominium for purposes of sale to others (see the cases of *DA Duncan v. Public Prosecutor* [1980] 2 MLJ 195 and *Public Prosecutor v. Abdul Manaf bin Muhammad Hassan* [2006] 3 MLJ 193).

B **[24]** Since the conviction was not in respect of MDMA, methamphetamine and MDA, we find that the defective charge had not occasioned a failure of justice nor had it caused any prejudice to the appellant.

C **[25]** The other point raised by learned counsel was in respect of the finding of trafficking. The learned trial judge had relied on the act of 'keeping' coupled with the quantity of the drugs and the recovery of transparent empty plastic packets of varying sizes and a quantity of rubber band to find that the appellant was keeping D the ketamine for purposes of sale to others. We are of the view that there was no error on the part of the learned trial judge in taking such approach as 'keeping' clearly falls within the definition of trafficking under s. 2 of the Act (see *Ong Ah Chuan v. PP* [1981] 1 MLJ 64; *PP v. Abdul Manaf bin Muhamad Hassan* [2006] E 3 MLJ 193).

[26] Having considered the factual matrix we are of the view that the conviction against the appellant is safe. In the circumstances, we unanimously dismissed the appeal. We affirmed the conviction F and sentence by the High Court.

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